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# Fifth report on unilateral acts of States*

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* Complexity of issues dealt with in the report resulted in the delayed submission of the present document.

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# I. Introduction[1]

## A. Previous consideration of the topic

1. The International Law Commission has been considering the topic of unilateral acts of States since its forty-ninth session, in 1997; at that time, a Working Group was established which prepared an important report that has provided a basis for the Commission's subsequent work.[2] The Commission has been giving more specific consideration to the topic since its fiftieth session, in 1998, when the Special Rapporteur submitted his first report;[3] in that report, he gave a general overview of the topic and provided the elements of a definition of unilateral acts, since in his view that was a fundamental issue which should be resolved prior to the preparation of draft articles and commentaries thereto, as the Commission had agreed.

2. In previous reports,[4] the Special Rapporteur, taking the Vienna regime as a valid frame of reference, to be viewed in the context of the sui generis nature of the unilateral acts with which the Commission is concerned, discussed several aspects of the topic, primarily those relating to the formulation and interpretation of unilateral acts.

3. On the basis of an extensive review of the literature, the Special Rapporteur also submitted some views regarding the classification of unilateral acts, a topic which appears fundamental to the structure of the draft articles which the Commission plans to prepare on the topic. In his opinion, the classification of unilateral acts according to their legal effects is not a mere academic exercise. On the contrary, for the reasons mentioned above, an appropriate classification of these acts — in itself a complex process involving several criteria — should facilitate the organization and progress of work on the topic. The Special Rapporteur believes that while not all rules concerning unilateral acts are necessarily applicable to all of them, some rules may be of general application. While it is not necessary to take a decision at this time on the classification of unilateral acts, an attempt could be made to develop rules applicable to all such acts.

4. A continuing source of concern, however, is the uncertainty which seems to persist regarding the subject-matter of the work of codification, that is, the unilateral acts which might fall within its definition. Some of them, as we will see, can be identified and associated with the conduct and attitudes of the State; others, while unquestionably unilateral acts from a formal standpoint, can be placed in a different sphere, that of treaties or treaty law, while certain others would seem to fall into the category of acts with which the Commission is concerned. Indeed, as will be seen, when we are dealing with one of the acts commonly referred to as "unilateral" from a material standpoint, it may fall outside the scope of this study. Such is the case with regard to waiver or recognition by means of implicit or conclusive acts. It has been stated that waiver and recognition, inter alia, are unilateral acts in the sense

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[1] The Special Rapporteur wishes to thank Mr. Nicolás Guerrero Peniche, doctoral candidate of the Graduate Institute of International Studies in Geneva, for the assistance provided in the research work relating to the fifth report.

[2] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), paras. 195-210.

[3] A/CN.4/486.

[4] A/CN.4/500 and Add.1, A/CN.4/505 and A/CN.4/519.

with which the Commission is concerned. However, closer examination of their form may lead us to conclude that not all unilateral acts of waiver or recognition fall into the category of interest to the Commission, and thus not all should be included in the definition we are seeking to develop.

5. In practice, we can see that recognition is effected through acts separate from the formal acts referred to above — in other words, through conclusive or implicit acts; this might be true, for instance, of the act of establishing diplomatic relations, by which a State implicitly recognizes another entity which claims the same status. An example of this would be the United Kingdom's implicit recognition of Namibia; the British Minister for Foreign Affairs stated in this regard that the establishment of diplomatic relations with the Government of Namibia in March 1990 constituted implicit rather than formal recognition.[5] It should also be noted that some of these acts are of treaty origin, as is the case of the agreement of 5 August 1979 between Mauritania and the Frente POLISARIO, referred to below; by their very nature, these acts should also be excluded from the scope of our study.

## B. Consideration of other aspects of international practice

6. The Special Rapporteur's work thus far has been based on an extensive study of doctrine and jurisprudence. However, while he is convinced that practice is of growing importance in this area, it has not been given the attention that it deserves. There is no doubt that this failure, which is due to the difficulties of gathering information in the matter, may have a negative impact on consideration of the topic. The Special Rapporteur is aware that without information concerning practice, it is impossible to prepare a comprehensive study of the topic, let alone embark on the task of codification and progressive development in that area. While unilateral acts are obviously common, there appear to be few cases in which their binding nature has been recognized. The Ihlen Declaration was for many years a classic example of a unilateral declaration. Since then, other unilateral declarations have been considered equally binding, although they were not subject to judicial examination; the German Government's declarations between 1935 and 1938 regarding the inviolability of the neutrality of certain European countries, which have been viewed in the literature as "guarantees", are one example. Also noteworthy is Austria's declaration of neutrality, which some consider a promise, and Egypt's declaration of 1957, although the latter was registered with the Secretary-General of the United Nations. The declarations made by the French authorities questioned by the International Court of Justice in the *Nuclear Tests* case would also be unilateral declarations of the type with which the Committee is concerned. Certain other unilateral declarations, such as negative security guarantees, which could, depending on their content, reflect a promise made by nuclear-weapon States to non-nuclear-weapon States, are another category of such acts, whose legal nature has not been examined by the courts or determined by the authors or the addressees, but which nonetheless may be considered binding from the legal point of view, as several members of the Commission noted in commenting on the second report of the Special Rapporteur, submitted in 1999.

[5] *The British Yearbook of International Law*, 1992, pp. 642-643; cited in María Isabel Torres Cazorla, "Los actos unilaterales de los Estados en el derecho internacional contemporáneo", unpublished, research paper submitted during the second round of candidacy for the post of tenured professor, University of Málaga, Spain, 2001, p. 57.

7. At the fifty-third session of the Commission, a Working Group was established to consider some aspects of the topic, as reflected in a report of which the Commission took note.[6] On that occasion it was noted that one of the problems posed by a study of the topic was that practice had not yet been given full consideration. The Working Group recommended that the Commission should request the Secretariat to circulate to Governments a questionnaire inviting States to provide additional information on practice with regard to the formulation and interpretation of unilateral acts.[7] Some States, such as Estonia and Portugal, replied to this questionnaire in a highly constructive manner; their comments are mentioned below.

8. The Government of Portugal provided valuable information on the formulation of unilateral acts in its international relations, qualifying them in each case. The Government refers to protests against certain acts of Australia related to East Timor and, secondly, the recognition of East Timor's right to independence.

9. According to the above-mentioned report, Portugal made a series of diplomatic protests to the Australian authorities between 1985 and 1991. In 1985, the Portuguese Government made known to Australia that it could not "but consider strange the attitude of the Australian Government in negotiating the exploration of the resources of a Territory of which Portugal is the administering Power, a fact which is internationally recognized ... the Portuguese Government cannot but express to the Australian Government its vehement protest for the manifest lack of respect for international law ...."[8]

10. In 1989, Portugal reiterated that "as the administering Power for the non-autonomous Territory of East Timor, Portugal protests against the text of the above-mentioned declarations ...". After the signature of the Timor Gap Treaty, Portugal let Australia know its view on the matter once more: "The Portuguese authorities have consistently lodged diplomatic protests with the Government of Australia .... In those protests ... the Portuguese Government pointed out that the negotiation and the eventual conclusion of such an agreement with the Republic of Indonesia ... would constitute a serious and blatant violation of international law. ... In proceeding with the signing of the above-mentioned agreement, Australia is continuing and bringing to its conclusion that violation of the law. ... In signing the 'Provisional Agreement' Australia acts in contempt, namely, of its duties to respect the right of the East Timorese to self determination. ... In light of the above, Portugal cannot but lodge its most vehement protest with the Government of the Commonwealth of Australia and to state that it reserves itself the right to resort to all legal means it will consider as convenient to uphold the legitimate rights of the East Timorese."[9]

11. The Portuguese Government considers that those unilateral acts, which it refers to as acts of protest, constitute a manifestation of will and of the intention "not to consider a given state of affairs as legal and ... thereby to safeguard its rights which have been violated or threatened."[10] This statement is extremely important in that it

[6] Oral report by the Chairman of the Working Group, A/CN.4/SR.2701.

[7] The questionnaire was transmitted to Member States in note No. LA/COD/39 of 31 August 2001. The replies received are contained in document A/CN.4/524.

[8] A/CN.4/524, reply by Portugal to question 1, para. 3.

[9] Ibid.

[10] Ibid., para. 4.

does not merely list and qualify the acts in question; it also notes the legal effects which it believes may result therefrom.

12. The Government of Estonia also provided extremely valuable information concerning practice. It states that "On December 19, 1991, the Supreme Council issued a Statement on the Property of the Republic of Latvia and the Republic of Lithuania, which could be considered a promise. The Supreme Court stated, considering the restoration of independence of Estonia, Latvia and Lithuania, that Estonia will guarantee legal protection of property in conformity with equality of legal protection of forms of property of the said States in Estonian territory in accordance with Property Law of Estonia".[11]

13. The Estonian Government mentions and qualifies other unilateral declarations in its reply to the above-mentioned questionnaire, including its declaration of 24 July 1994 on the social guarantees of former Russian Federation military personnel; its declarations in recognition of States, such as its recognition of the Republic of Slovenia on 25 September 1991; and the Supreme Council's declaration of 3 April 1990 on the restoration of independence of the Republic of Lithuania, recognizing Lithuania as an independent State. In September 1992, the Estonian Parliament adopted a declaration on restoration, which explicitly stated that the present Republic of Estonia was the same subject of international law that had first been declared in 1918.[12] The Lithuanian Government adds, "With some unilateral acts the legal effects are obvious and clear, as is the case with statement guaranteeing legal protection to property of Latvia and Lithuania, recognition of other States ...".[13]

14. Clearly, there is a wide variety of unilateral acts. As some have stated, "the great number of terms which have been used or suggested for use in this field have been a hindrance rather than a help towards funding a satisfactory typology."[14] Nevertheless, doctrine, and even the Commission itself, has identified promises, protest, waiver and recognition as unilateral acts. Furthermore, the Commission has noted that the work of codification and progressive development may focus, at least initially, on consideration of promises — in other words, that it may seek to develop rules on the functioning of unilateral acts, which, like promises, imply the assumption of unilateral obligations by one or more author States.

15. In studying such acts, bearing in mind that they may not be the only unilateral acts, we note that recognition through a formal declaration is common in practice; there are many examples of such acts, particularly in the context of acts of recognition of government, following the political changes that began in 1960 with the decolonization and independence of colonial countries and peoples and, more recently, in the context of the creation of new States following changes in the former Czechoslovakia, the former Soviet Union and the former Yugoslavia.

16. A study of diplomatic correspondence, as reflected in the major international press, suggests that States frequently recognize other States through diplomatic notes. For example, by a declaration of 5 May 1992, Venezuela "recognizes the

[11] Ibid., reply by Estonia to question 1, para. 6.
[12] Ibid., paras. 8, 9 and 11.
[13] Ibid., reply to question 3.
[14] Wilfried Fiedler, "Unilateral Acts in International Law", in Rudolph Bernhard (ed.), *Encyclopedia of Public International Law*, vol. IV (2000), p. 1018.

Republic of Slovenia as sovereign and independent" and expresses its "intention to establish ... diplomatic relations".[15] Similarly, by a declaration of 14 August 1992, the Venezuelan Government decided "to recognize as a sovereign and independent State ... the Republic of Bosnia and Herzegovina" and expressed its "intention to establish diplomatic relations".[16] Lastly, by a declaration of 5 May 1992, Venezuela decided "to recognize the Republic of Croatia as a sovereign and independent State" and expressed "its intention to establish diplomatic relations".[17]

17. Through a study of routine diplomatic procedures, we note certain useful practices capable of qualification. One such case is the recognition of States emerging from the former Czechoslovakia, the former Soviet Union and the former Yugoslavia. Examples include notes reflecting such recognition which clearly constitute unilateral acts, such as those sent by the British Government to the Heads of State of some of those countries; for example, by a note dated 15 January 1992, Prime Minister John Major stated:

> "I am writing to place on record that the British Government formally recognizes Croatia as an independent sovereign State. ... In recognizing Croatia, we expect the Government of Croatia to take swift steps to meet the reservations set out in M. Badinter's report with regard to the protection of the rights of minorities. ... I look forward to the establishment of diplomatic relations. I can confirm that, as appropriate, we regard Treaties and Agreements in force to which the United Kingdom and the Socialist Federal Republic of Yugoslavia were parties as remaining in force between the United Kingdom and Croatia".[18]

18. Recognition, usually a unilateral act, produces specific legal effects which will now be described, although the question will also be considered in future reports. Recognition does not confer rights on the author, but rather imposes obligations; through recognition, as noted in the literature, "the State declares that it considers a situation to exist, and it cannot subsequently state otherwise; whether or not it exists from an objective point of view, the situation will henceforth be enforceable with respect to that State if it was not already so."[19]

19. Some of the many declarations formulated by States have been recognized as promises, such as the ones, discussed above, that were formulated by the French authorities whom the International Court of Justice questioned in the *Nuclear Tests* case. Other examples include the declaration by the Government of Spain, reflected in the Agreement of the Spanish Council of Ministers of 13 November 1998 and referred to in the previous report, in which Spain decided to provide emergency assistance to mitigate the damage caused by Hurricane Mitch in Central America, and the declaration made by the Government of Tunisia on the occasion of a visit by the Prime Minister of France, Raymond Barre, on 26 October 1980, in which Tunisia announced its determination to unfreeze, within a relatively short time, the

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[15] Libro amarillo, Ministry of Foreign Affairs of Venezuela (Caracas, 1992), p. 505.
[16] Ibid., p. 508.
[17] Ibid.
[18] BYBIL, 1992, p. 636.
[19] Jean Combacau and Serge Sur, *Droit international public* (Paris, Montchrestien, 1995), p. 281.

French funds retained after Tunisia gained its independence in 1956. These measures entered into force on 1 January 1981.[20]

20. A study of practice reveals other unilateral declarations which may be qualified as promises in that they correspond to the known doctrinal definition of that act. One example is the declaration made by the President of France, Jacques Chirac, in which he undertook to cancel the debt of El Salvador, Guatemala, Honduras and Nicaragua, amounting to 739 million francs, following the damage caused to the region by Hurricane Mitch. President Chirac also undertook to negotiate a reduction of the trade debt during the following meeting of the Paris Club.[21] A similar case is that of the declarations made by President José María Aznar of Spain on 4 April 2000, when he stated publicly, "I also wish to inform you that I have announced the cancellation of the debt owed by sub-Saharan African countries, worth $200 million in official development assistance credits".[22]

21. Declarations containing a waiver may also be observed in international practice. One example, albeit conventional in origin, is Mauritania's waiver of its claims to Western Sahara on 5 August 1979. An agreement signed by Mauritania and the Frente POLISARIO states that "The Islamic Republic of Mauritania solemnly declares that it has and shall have no territorial or other claims to Western Sahara".[23]

22. Other declarations have also been observed in practice, including the declaration of 20 May 1980, in which the State Department announced that the United States of America waived its claim of sovereignty over 25 Pacific islands.[24]

23. There are also declarations that may contain several material unilateral acts, as is the case of the declaration by Colombia, formulated in a note of 22 November 1952, in which we can see a recognition, a waiver and a promise. In this note, the Government of Colombia declares that "it does not contest the sovereignty of the United States of Venezuela over the Archipelago of Los Monjes and, consequently, that it does not contest or have any complaint to make concerning the exercise of the sovereignty itself or of any act of ownership by that country over the said archipelago". This declaration, formulated correctly, for a specific purpose, and notified to the addressees, is a unilateral act producing legal effects that the author State intended to produce when formulating it.

24. As we shall see below, and as has been said on several occasions, it is clear that unilateral acts exist in international relations and that they are increasingly important and frequent as a means of expression of States in their international relations. But this practice, arising from the ordinary understanding of the evolution of such relations, is indeterminate to the extent that neither the authors nor the addressees of such acts have the common and general conviction that it reflects the formulation of unilateral acts in the sense that is of interest to the Commission, although some States recognize and qualify the practice as involving unilateral acts.

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[20] *Revue générale de droit international public*, 1981, p. 396; cited in Torres, p. 49.

[21] RGDIP, 1999, p. 195; cited in Torres, p. 50.

[22] *Actividades, Textos y Documentos de la Política Exterior Española*, 2000, p. 102; cited in Torres, p. 50.

[23] RGDIP, 1980, p. 402.

[24] RGDIP, 1980, p. 1101.

It should be emphasized that this perception is very different from the one created when the rules on the law of treaties were drafted; the existence of treaties as a legal instrument was more apparent then, owing to the attitude of States towards their existence, their importance and their legal effects. It was much simpler to identify rules of customary law in this context than in that of unilateral acts.

## C. Viability and difficulties of the topic

25. Most members of the Commission have indicated that the topic could be suitable for codification, despite its complexity and the difficulties that some of its aspects pose, as well as the evident weaknesses in gathering information on the topic, including the inadequate consideration of State practice. In general, the representatives of States to the Sixth Committee were of the same opinion.

26. Indeed, members of the Commission indicated that the issue was important and interesting, [25] and a prime candidate for progressive development and codification,[26] while satisfaction with the draft articles presented[27] and optimism as to the possibility of producing a set of draft articles on the topic were expressed.[28]

27. It is true that some members expressed certain doubts about the feasibility of examining the topic and even about the approach and the grounds for doing so, which, according to some, did not take into account State practice, among other issues. One Government indicated that it "continues to consider that any approach which seeks to subject the very wide range of unilateral acts to a single set of general rules is not well-founded."[29]

28. Some Governments have also gone on record about the relevance of the topic and the approach taken by the Commission when examining it. For example, in its observations on the topic when completing the questionnaire distributed by the Secretariat, the Government of Portugal indicated that "... it recognizes the important role played by unilateral acts (...) and the need to develop rules to regulate their functioning."[30]

29. Most States tend to consider that it is possible to carry out this task and that the Commission should continue with its work. China stressed that unilateral acts were becoming increasingly important and that the codification and progressive development of the law relating to them were essential, difficult though the process would be.[31] Some countries consider that the topic should be approached in a more limited way. Spain indicated that it would be desirable to concentrate on certain typical unilateral acts and the legal regime which should apply to each.[32] The Nordic countries stated their preference for limiting the study of the topic to a few

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[25] See the statement by Mr. A. Pellet, A/CN.4/SR.2695.
[26] See the statement by Mr. J. Illueca, A/CN.4/SR.2695.
[27] See the statement by Mr. R. Goco, A/CN.4/SR.2695.
[28] See statement by Mr. Al Baharna, A/CN.4/SR.2695. See also the statements of Mr. C. Economides and Mr. P. S. Rao, A/CN.4/SR.2696.
[29] A/CN.4/524, general comments, United Kingdom, para. 1.
[30] Ibid., Portugal, para. 1.
[31] A/C.6/56/SR.22, para. 45. See also the statements by the representatives of the Russian Federation and Poland, A/C.6/56/SR.22, para. 80, and A/C.6/56/SR.24, para. 2, respectively.
[32] See the statement by the representative of Spain, A/C.6/56/SR.12, para. 44.

general rules and a study of certain particular situations.[33] Japan considered that it would be wise for the Commission to focus on the more highly developed areas of State practice.[34] In the opinion of India, the Commission could consider the possibility of framing a set of conclusions on the topic, instead of proceeding with the preparation of draft articles.[35]

30. We can confidently say that States are increasingly making use of unilateral acts in their international relations. Evidently, this assertion raises doubts about whether those acts which in some way fall within this context, are unilateral acts in the sense that is of interest to the Commission, acts which formulated unilaterally, individually or collectively, may produce legal effects by themselves without the need for acceptance, assent or any other indication of agreement on the part of the addressee of the act. Even though unilateral acts are not referred to in article 38, paragraph 1, of the Statute of the Court, "both State practice and legal scholars presume the existence of such a category of legal acts."[36]

31. Of course, if the matter is complicated in the context of the formulation and application of such acts, it is even more complex when examining their legal effects, a matter that will be discussed below. However, it is worth underscoring that, as some have indicated,

> "the scope of unilateral acts, of certain unilateral attitudes, such as the prolonged non-exercise of a right, silence when it was necessary to say something, tacit acquiescence and estoppel, is characterized by uncertainties about their legal effects. In some circumstances, the International Court of Justice has dispelled such uncertainties by resorting to the principle of good faith and to objective considerations that are inferred from the general interest, particularly from the need for legal certainty."[37]

32. In addition to the indeterminacy of the subject matter of the proposed work of codification and progressive development, one of the issues that gives rise to doubts about the viability of the topic is that, although a unilateral act may be formulated unilaterally, its materialization, or the legal effects it produces, is related to the addressee or addressees. This could lead to a rapid but mistaken conclusion that all unilateral acts are basically treaty acts, that unilateral acts would therefore not exist as such and that, consequently, no regime other than the one for treaty acts would be required to regulate their functioning.

33. The elaboration of the act and its legal effects are two aspects of the topic that should be carefully distinguished in order to avoid erroneous interpretations about the nature of such acts and the possibility that they may be the subject of codification and progressive development.

34. An act is unilateral in its elaboration, even though its effects generally take place in a relationship that extends beyond that sphere. A relationship between the author State or States and the addressee or addressees is always posited. The bilateralization of the act, if we can use that term, may not mean that it becomes a

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[33] See the statement by the representative of Norway, A/C.6/56/SR.22, para. 32.
[34] A/C.6/56/SR.22, para. 56.
[35] A/C.6/56/SR.24, para. 6.
[36] Fiedler, op. cit., p. 1018.
[37] Charles de Visscher, *Les effectivités en droit international public* (Paris, Pédone, 1967), pp. 156-157.

treaty act. The act continues to be unilateral and is created in this context, even though its materialization or legal effects belong in another, wider sphere. In other words, the unilateral act produces its legal effects even before the addressee considers that the act is enforceable in respect of the author State or States. Obviously, "most acts are inadequately disassociated from the mechanism of tacit acquiescence that deprives them of their originality; other acts, although considered unilateral, are even more closely associated with a genuine treaty mechanism (accession, waiver, reservation, etc.), to the point that it is not worth disengaging them".[38]

35. Evidently, it is very difficult to identify and qualify a unilateral act. In the case of a promise, for example, the matter is not easy. It is necessary to start from the premise that the international unilateral acts exist, although they are rare. As has been said, "such rarity is easily explained, since no State would willingly make spontaneous and gratuitous concessions". Also, the question is whether an act may be qualified as a promise. In this respect, as indicated in the literature, "detecting these purely unilateral promises requires meticulous research in order to determine whether a fundamental bilaterality is hidden behind the formally unilateral facade of a declaration of intent".[39]

36. When examining the Ihlen declaration or the 1952 note from the Government of Colombia referred to above, we can affirm that we are in the presence of a waiver, which is also a recognition or a promise, and that this has a bearing on the legal effects that such declarations produce. Consequently, it is not easy to conclude unequivocally that we are in the presence of a specific category of unilateral acts, although what is most important is the legal effects that they produce.

## D. Content of this report and recapitulative nature of its chapter II

37. During the fifty-third session of the Commission in 2001, a member underscored the importance of asking the Special Rapporteur to prepare a recapitulative report that would clarify the status of discussions on the topic in general and on the draft articles submitted up to then, while allowing the consideration of the topic to proceed as it had up to that point. That comment, and the start of a new quinquennium, made it necessary to take this concern into account; hence chapter II of the fifth report, which the Special Rapporteur is submitting to the Commission for its consideration.

38. The Special Rapporteur further considers that the work to be accomplished in the short term must be closely related to a longer-term programme. Accordingly, he has set out at the end of this report a general idea concerning future work, which will in any case have to be considered by the Commission.

39. Chapter II again addresses some questions which, in the view of the Special Rapporteur, should be studied in greater detail and clarified in order to allow the consideration of the topic to proceed in a more structured manner. To begin with, the definition of a unilateral act is considered in the light of the evolution of the discussions in both the Commission and the Sixth Committee. A decision in that regard is essential to the consideration of the topic and progress in that respect,

[38] Paul Reuter, *Principes de droit international public* (Paris, PUF, 1968), p. 94.

[39] Eric Suy, *Les actes juridiques unilatéraux en droit international public* (Paris, 1962), p. 11.

although the Special Rapporteur is fully aware of the complexities and difficulties it poses.

40. A definition should cover the majority of unilateral acts, which doctrine and jurisprudence recognize as acts that produce legal effects in and of themselves, regardless of their content. It is important to adopt a definition that allows the various acts that are regarded as unilateral for the purposes of the Commission's consideration of the topic to be placed in context. The definition will have to be broad in order to avoid the exclusion of some of those acts from the scope of the study; at the same time, however (and this reflects its complexity), it will need to be restrictive so as not to leave the door open too far to the inclusion of acts not compatible with or not falling into the category of acts in question. A balanced approach is therefore essential in this regard.

41. A second question relates to the conditions of validity and causes of invalidity of unilateral acts, again in accordance with the discussion of the topic in both the Commission and the Sixth Committee. It has been pointed out that consideration of the regime of invalidities, which goes beyond consideration of the factors vitiating consent, or, in this context, vitiating the expression of will, must be preceded by consideration of the factors determining the conditions of validity of the act. All those aspects are addressed in greater detail in this report. Some other questions related to the non-application of unilateral acts are also taken up.

42. A third question that is delved into, again within the same parameters, relates to the rules of interpretation applicable to unilateral acts, a question that was submitted to the Commission by the Special Rapporteur in his fourth report and discussed at the fifty-third session. A new version of the draft articles submitted previously is set out at the end of the review.

43. Lastly, in this chapter I, another brief comment is made on the possibility of classifying unilateral acts and on their relevance and importance to the structure of the work that would be carried out on the topic.

44. Chapter III addresses several questions within the framework of the possibility of elaborating common rules applicable to all unilateral acts, regardless of their name, content and legal effects. The general rule concerning respect for unilateral acts, which is based on article 26 of the Vienna Convention of 1969 referring to the basic rule of the law of treaties, *pacta sunt servanda*, is examined. An attempt is made to base the binding character of the act on a rule formulated to that end, a topic that was addressed in the first report of the Special Rapporteur. Second, two questions are addressed which may be the subject of elaboration of rules common to all acts: the application of the act in time, which raises the issue of retroactivity, and the non-retroactivity of the unilateral act and its application in space.

45. Chapter IV discusses an important topic: the determination of the moment when the unilateral act begins to produce its legal effects, which is closely related to the concept of entry into force in the context of the law of treaties, although of course with the specific characteristics of such acts. These are two concepts which cannot be conflated by the very nature of the legal acts in question, but which clearly have important elements in common. In this instance it is not a matter of preparing draft articles, but rather of raising some issues for discussion in the Commission, so as to facilitate the work of codification.

46. Chapter V sets out the structure of the draft articles in accordance with prior discussions and the future plan of work which the Special Rapporteur is submitting to the Commission for its consideration.

# II. Recapitulative consideration of some fundamental issues

47. In order to facilitate consideration of the topic in the Commission, it was deemed important, as indicated above, to re-examine, albeit in summary fashion, four issues that are regarded as basic in order to bring forth new elements and clarifications; these issues are the definition of the unilateral act, the conditions of validity and causes of invalidity and other questions related to the non-application of unilateral acts, the rules of interpretation applicable to such acts, and classification and qualification and their impact on the structure of the draft articles.

## A. Definition of unilateral acts

48. The definition of unilateral acts is a fundamental issue that must be resolved. The Special Rapporteur has proposed a definition which has evolved in accordance with the views and comments of the members of the Commission and the representatives of Member States, both in the Sixth Committee and in their replies to the questionnaire sent in 2001.

49. At the fifty-third session of the Commission, the view was expressed that progress had been made and that some appropriate terms had been introduced, leaving aside those on which there was no consensus in the Commission as to whether they should be retained.

50. As the discussions on the topic evolved, the draft definition of unilateral acts became more acceptable, and it was therefore submitted to the Drafting Committee in 2000 in the terms in which it was formulated in the third report.

51. A number of differences can be seen in the version that was transmitted to the Drafting Committee of the Commission. First, it will be noted that the word "declaration" has been replaced by the word "act", which was considered to be broader and less exclusive than the word "declaration", as it would cover all unilateral acts, especially those which might not be formulated by means of a declaration, although the Special Rapporteur was of the view that unilateral acts in general, regardless of their name, content and legal effects, are formulated by means of a declaration.

52. The concept of "autonomy" was also excluded from the definition following the long discussion to which it gave rise in the Commission, although the Special Rapporteur was of the view that autonomy was an important characteristic, that it should perhaps be interpreted differently, but that in any case it signified independence from other legal regimes and would mean that such acts could produce effects in and of themselves. It will be recalled that the International Court of Justice explained in the *Nuclear Tests* case that what was involved was the

"strictly unilateral nature"[40] of certain legal acts, although it referred to one such act, a promise, which appears to reflect the independent character of such acts.

53. As has been pointed out, legal scholars have had recourse to the independence of unilateral acts in characterizing such manifestations of will; the Special Rapporteur shares that approach. Professor Suy, for example, notes that "as to its effectiveness, the manifestation of will may be independent from other expressions of will emanating from other subjects of law."[41] For some members, however, unilateral acts cannot be autonomous because they are always authorized by international law.

54. The matter was also discussed in the Sixth Committee in 2000. On the one hand, it was held that the concept of autonomy, understood as independence from other, pre-existing legal acts, or as the State's freedom to formulate the act, should be included in the definition.[42]

55. With regard to the phrase "expression of will formulated with the intention of producing legal effects", it will be noted that during the discussions in the Commission in 2000, some were of the view that it did not need to be included. They even pointed to the possible tautology or redundancy of such terms, but as reflected in the report which the Commission adopted that year, "there was a clear-cut difference between the first term, which was the actual performance of the act, and the second, which was the sense given by the State to the performance of that act. The two were complementary and should be retained."[43]

56. A more explicit reference to the expression of will remains pertinent, as it is a fundamental aspect of a legal act in general and, clearly, of the unilateral acts with which we are concerned. The importance attached to the role of will in legal acts is well known. For some, in fact, the act is an expression of will, which is reflected in the proposed definition. This also accounts for the importance attached to the interpretation of will, be it the declared or the actual will of the author of the act, and to the flaws that may affect its validity.

57. Unilateral acts have been defined in nearly all of the literature, without major differences between authors, as "the expression of will formulated by a subject of the international legal order with the intention of producing legal effects at the international level".[44] As one author states, "Unilateral legal acts are an expression of will ... envisaged in public international law as emanating from a single subject of law and resulting in the modification of the legal order."[45] For others, unilateral acts "emanate from a single expression of will and create norms intended to apply to subjects of law who have not participated in the formulation of the act."[46]

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[40] *I.C.J. Reports 1974*, p. 267.

[41] E. Suy, op. cit.

[42] See the statement by the representative of Italy, A/C.6/55/SR.19, para. 19.

[43] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 607.

[44] Santiago Urios Moliner, "Actos unilaterales y derecho internacional publico: delimitación de una figura susceptible de un régimen jurídico comun", thesis, Universitat Jaume I, Spain, 2001, p. 59.

[45] F. Regaldies, "Contribution à la étude de l'acte juridique unilatéral et droit international public", *Revue Juridique Themis*, vol. 15, Montreal, p. 417.

[46] Jean-Paul Jacque, "A propos de la promesse unilatérale", *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité* (Paris, 1981), p. 239.

58. The expression of will is closely linked to the legal act and, consequently, the unilateral act. Will is a constituent of consent and is also necessary to the formation of the legal act. Will should, of course, be seen as a psychological element (internal will) and as an element of externalization (declared will), a view that is considered in another context below.

59. The definition of recognition given in the specialized literature is based on the expression of will. For some, recognition is "a general legal institution which authors unanimously regard as a unilateral expression of will emanating from a subject of law, by which that subject first takes note of an existing situation and expresses the intention to regard it as legitimate, as being the law."[47] A promise would also be based on the expression of will.[48] The same applies to waiver, which would be "the expression of will by which a subject of law gives up a subjective right without there being a manifestation of will by a third party."[49]

60. In addition, the phrase "the intention to acquire legal obligations" was replaced by the expression "the intention to produce legal effects", which was considered to be broader and to cover both the assumption of obligations and the acquisition of rights. It should be noted, however, that the Commission remains of the view that a State cannot impose unilateral obligations on another State through an act formulated without its participation and consent. On that point, it reiterated principles firmly established in international law, including the principle of *res inter alios acta* and the principle of Roman law, *pacta tertiis nec nocent nec prosunt*, i.e., that agreements neither bind nor benefit third parties. As has been stated, "In traditional international law, it is impossible, in principle, for a subject of law to create an obligation for another subject without the latter having given its consent."[50] It should be underscored that the justification for such a rule would be based not solely on that principle, which is applicable in the contractual field, but on the sovereignty and independence of States. International jurisprudence is clear in this regard. We should recall the decision of arbiter Max Huber in the *Island of Palmas* case: "It appears further to be evident that Treaties concluded by Spain with third Powers recognizing her sovereignty over the 'Philippines' could not be binding upon the Netherlands."[51] That decision also points out that "it is evident that whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers."[52] We should also recall the decision, cited in previous reports, of the Permanent Court of International Justice in the *Free Zones* case, in which the Court stated that "even were it otherwise, it is certain that, in any case, Article 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a Party to that Treaty, except to the extent to which that country accepted it."[53] Lastly, mention should be made of the decision in the *Aerial Incident* case of 27 July 1955, in which the International Court of Justice stated that article 36, paragraph 5, of the Statute of the Permanent Court "was without legal force so far as non-signatory States were concerned."[54]

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[47] E. Suy, op. cit., p. 191.
[48] Jacque, op. cit., p. 339.
[49] E. Suy, op. cit., p. 156.
[50] J. P. Jacque, op. cit., p. 329.
[51] *Reports of International Arbitral Awards*, vol. II, 1949, p. 850.
[52] Ibid., p. 842.
[53] *P.C.I.J., 1932, Series A/B*, No. 46, p. 141.
[54] *I.C.J. Reports 1959*, p. 138.

61. International law is also clear in that, in principle, not even a treaty can confer rights on States that are not party to it, as the Permanent Court of International Justice established in the *Case concerning certain German interests in Polish Upper Silesia*, when it indicated that "the instruments in question make no provision for a right on the part of other States to adhere to them. ... A treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced in favour of third States".[55]

62. Evidently, the law of treaties establishes exceptions to this rule, such as the stipulation in favour of third parties that requires the consent of the third State,[56] and we should ask ourselves whether, in the context of unilateral acts, we might consider the possibility that one State might impose obligations on another without its consent; in other words, whether it is possible to go beyond reaffirming rights and legal claims.

63. When examining the various unilateral acts that we have referred to, we can see that they do not impose obligations on States. Waiver and promises are clear in this respect. Recognition, referring to recognition of States, could perhaps bear closer examination.

64. Indeed, when an entity is recognized as having the condition or status of a State, the author State assumes some obligations that are related to the very nature of the State and that arise from international law. Yet the question might be asked whether the obligations corresponding to the State in accordance with international law may be imposed on the recognized entity. The answer to this depends on the nature of the recognition of States. If the thesis that the act of recognition is merely declarative and not constitutive is accepted (and we share this point of view), it can be said that such obligations do not arise from that act of recognition but from its very existence as a State.

65. Most members of the Commission and representatives to the Sixth Committee considered, that the expression should be broader; however, in our opinion, that could not allow or be interpreted as allowing States to impose obligations on third States without their consent.

66. Lastly, the requirement of "publicity" is replaced by that of "notoriety", since it is considered that the former has been used exclusively in the case of a unilateral act formulated *erga omnes*, as were the declarations formulated by the French authorities and considered by the International Court of Justice in the *Nuclear Tests* case. However, the Commission discussed whether that element was constitutive of the act itself or whether, to the contrary, it was a declarative element that was not essential to the definition of the act.

67. For a Government, the intention to produce legal effects referred to in the definition is not the basis for the binding nature of the unilateral act. Thus, when agreeing with the definition proposed by the Special Rapporteur, the Government of

[55] *P.C.I.J., 1926, Series A*, No. 7, pp. 28-29.

[56] The Permanent Court in the *Free Zones* case indicated that "there is nothing to prevent the will of sovereign States from having this object and this effect". *P.C.I.J., 1932, Series A/B*, No. 46, p. 147.

Portugal states that "it is international law, and not the State's intention, that provides for the legal force of unilateral acts in the international legal order".[57]

68. The proposed definition, and there appears to be a general consensus in the Commission on this, refers to acts formulated by the State. However, with regard to the addressee, a broader formulation has been introduced in relation to the first one proposed by the Special Rapporteur; it reflects that even though it is a question of acts of State, they may be addressed to other subjects of international law. A member of the Commission even indicated that the addressee, in addition to being a State or an international organization, could be other distinct subjects and entities, an opinion that the Commission has not yet considered. The definition initially proposed could, according to an opinion expressed in the Commission, limit the effects of unilateral acts to relations with other States and international organizations, excluding other entities, such as national liberation movements, and others that might be the beneficiaries of such acts if that was the author's intention.

69. The inclusion of the word "unequivocal" was generally accepted by the Commission. During the discussion, it was considered that "it was acceptable, since ... it was hard to imagine how a unilateral act could be formulated in a manner that was unclear or contained implied conditions or restrictions or how it could be easily and quickly revoked".[58] However, some members opposed the inclusion of the word because they considered that "it should be understood that the expression of will must always be clear and comprehensible; if it was equivocal and could not be clarified by ordinary means of interpretation it did not create a legal act. ... [t]he ideas of clarity and certainty [that were conveyed] by means of the word 'unequivocal' was a question of judgement which was traditionally for the judge to decide and did not belong in the definition of unilateral acts".[59]

70. In this respect, in 2000, the Sixth Committee indicated that the word "unequivocal" qualifying "expression of will" in the definition need not be construed as equivalent to "express". An implicit or tacit expression of will could be unequivocal.[60]

71. In any case, the draft definition must be considered by the Drafting Committee during the fifty-fourth session of the Commission. Evidently, there is a certain tendency towards focusing consideration of unilateral acts mainly on promises, in other words, elaborating rules based primarily on one kind of promise, an international promise, although this is clearly a very important unilateral act that has a certain influence on the evolution of the topic. A balanced approach is needed, considering the different unilateral acts that both doctrine and jurisprudence recognize as such, particularly in the context of the work of codification and progressive development that the Commission has undertaken. In this respect, it is worth recalling that the Commission itself has considered that the work of codification can be focused, at least during the first stage, on promises, understood as they are defined in most of the literature, i.e., as reflecting the unilateral assumption of obligations.

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[57] A/CN.4/524, general comments, Portugal, para. 2.

[58] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 553.

[59] Ibid., para. 554.

[60] See the statement by the representative of Guatemala, A/C.6/55/SR.20, para. 28.

72. Regarding the diversity of acts and the difficulties involved in grouping and classifying them (which to some extent relates to their legal effects), we should indicate that during its deliberations, the Commission was able to exclude a number of acts and kinds of conduct that, even though they produce legal effects, are distinct from the legal act that it is attempting to regulate.

73. Some unilateral declarations raise doubts about their place in the Vienna regime or in the context of unilateral acts; this is the case, for example, of declarations accepting the jurisdiction of the International Court of Justice formulated by States pursuant to article 36 of the Statute, which the Commission has examined previously. The Special Rapporteur, concurring with some legal scholars, has affirmed that such declarations belong within treaty relationships. However, as the Court itself has recognized, their specific characteristics can make them appear different from what are clearly treaty declarations.

74. Other declarations already examined seem to belong more easily in the context of the unilateral acts that are of interest to the Commission. These are the declarations formulated by a State's representative during a proceeding before an international court. The question that arises is whether such declarations may or may not be considered unilateral and binding on the State on whose behalf the agent acts, provided, of course, that they comply with the conditions for validity of the act.

75. This is the case of the declaration formulated by the agent of Poland before the Permanent Court of International Justice in the *Case concerning certain German interests in Polish Upper Silesia*. With regard to a declaration made by the representative of Poland, the Court stated that:

> "The representative before the Court of the respondent Party, in addition to the declarations above mentioned regarding the intention of his Government not to expropriate certain parts of the estates in respect of which notice had been given, has made other similar declarations which will be dealt with later; the Court can be in no doubt as to the binding character of all these declarations."[61]

76. The Special Rapporteur has proposed to separate some types of conduct and attitudes, such as silence, which, even though they can undoubtedly produce legal effects, do not constitute unilateral acts in the strict sense of the term: a unilateral act is an expression of will, formulated with the intention of producing legal effects in relation to a third State that has not participated in its formulation, which produces legal effects without the need for participation of that third party, in other words, without the latter's acceptance, assent or any other reaction that would indicate assent.

77. Many have considered silence to be a reactive expression of will, in the face of a situation or claim by another subject of international law. The value placed on it by both doctrine and international courts should not be disregarded. In some important judicial decisions, such as those relating to the *Fisheries Case (United Kingdom v. Norway)*[62] and the *Case concerning the Temple of Preah Vihear*,[63] silence and its legal effects were considered; this has been elaborated on further in previous reports and was also discussed in the Commission. It is worth asking

[61] *P.C.I.J., 1926, Series A*, No. 7, p. 13.
[62] *I.C.J. Reports, 1951*, para. 139.
[63] *I.C.J. Reports, 1962*, para. 23.

ourselves whether the expression of will in those cases differs from the expression of will whose definition concerns us now. Should the Commission determine that it is pertinent to include silence in its study of unilateral acts, it would be necessary to determine the meaning and limit of the State obligation that this conduct expresses. The Commission would have to consider the matter and decide whether conduct such as silence should be counted among the expressions of will that it seeks to regulate and, consequently, ensure that it is covered by the definition to be adopted this year, or, on the contrary, as has been argued, whether it should be removed from the scope of the study and excluded from the definition.

78. Some have stated that the State may even carry out unilateral acts "without knowing it", independently of its intention. Clearly, this would seem possible, as it can occur in other legal spheres. But it is worth asking ourselves whether that expression of will, which could have different connotations, constitutes a unilateral act in the sense that interests us. This should also be examined carefully so that it may be included or excluded once and for all, and so that an adequate definition can be elaborated.

79. Other acts, even treaty acts, can be confused with the unilateral acts with which the Commission is concerned. This is the case of treaties that grant rights or impose obligations on third parties which have not taken part in their elaboration. Such treaty acts may be considered unilateral acts of a collective or treaty origin in favour of third parties; however, they are really collateral agreements or agreements with stipulations in favour of third parties, as envisaged in the 1969 Vienna Convention and provided for in its articles 35 and 36. In any case, for a third State to be bound by a treaty, it must expressly accept any obligations deriving therefrom, or, in the second case, accept the rights that may derive from that treaty in whose elaboration the State did not take part, as less rigidly envisaged in the 1969 Convention.

80. As indicated above, the definition of a unilateral act is fundamental, and its consideration should take into account all unilateral acts in order to arrive at a broad, non-exclusive definition.

81. The text of the article proposed by the Special Rapporteur and transmitted to the Drafting Committee is as follows:

**Article 1. Definition of unilateral acts**

For the purposes of the present articles, "unilateral act of a State" means an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organization.